

LUKE W. COLE, California Bar No. 145,505  
CAROLINE FARRELL, California Bar No. 202,871  
BRENT J. NEWELL, California Bar No. 210,312  
Center on Race, Poverty & the Environment  
47 Kearny St, Suite 804  
San Francisco, CA 94108  
415/346-4179 • fax 415/346-8723

NANCY S. WAINWRIGHT, Alaska Bar No. 8711071  
Law Offices of Nancy S. Wainwright  
13030 Back Road, Suite 555  
Anchorage, AK 99515-3358  
907/345-5595 • fax 907/345-3629

Attorneys for Plaintiffs Enoch Adams, Jr., Leroy  
Adams, Andrew Koenig, Jerry Norton, David  
Swan and Joseph Swan

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED  
Defendant.

NANA REGIONAL CORPORATION and  
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

DECLARATION OF LUKE  
COLE IN SUPPORT OF  
PLAINTIFFS' RESPONSE  
TO TECK COMINCO'S  
OBJECTIONS TO PLAINTIFFS'  
EXHIBITS

DECLARATION OF LUKE COLE IN SUPPORT OF  
PLAINTIFFS' RESPONSE TO TECK COMINCO'S  
OBJECTIONS TO PLAINTIFFS' EXHIBITS

1 I, Luke Cole, declare:

2 1. I am over 18 years of age and not a party to this action. I am the lead counsel for  
3 plaintiffs in this action and as such have responsibility for all filings and disclosures in the case.

4 2. On January 18, 2008, all parties' counsel met at the offices of Teck Cominco's  
5 counsel, Hartig Rhodes, in Anchorage to review the parties proposed documents.

6 3. I initiated the meeting pursuant to Local Rule 39.3.

7 4. At that meeting, I made available to defendants' counsel all documentary exhibits it  
8 has lodged with the Court, and provided counsel with a preliminary list containing every  
9 document it intended to introduce at trial (and ultimately lodged with the Court). A true and  
10 correct copy that list is attached as Exhibit 1 (the actual version provided to Teck Cominco may  
11 have a date listed on it). Adams's list consisted of 203 exhibits. During exhibit review, the  
12 parties agreed to include roughly 20 of those exhibits as "Joint Exhibits" to be filed by all parties.  
13 Adams thus took those exhibits off its final exhibit list.

14 5. At that meeting, Teck Cominco's counsel Sean Halloran approved the admission of a  
15 number of documents.

16 6. In reliance on this approval and stipulated admission, I prepared and marked the  
17 exhibits admitted by all parties as "ADM" on the exhibits lodged with the Court on January 22  
18 and delivered to all parties on January 23, 2008.

19 7. The documents that Teck Cominco approved during the Rule 39.3 review and now  
20 objects to include Exhibits 5, 74-90, 92-101, 108-109, 115-121, 124-125, 127, 131, 138, 150-  
21 155, 159 and 168.

22 8. Adams counsel showed Teck Cominco's counsel the excerpt of the EPA's  
23 Environmental Appeals Board's decision during the January 18, 2008 exhibit review. Teck  
24 Cominco's counsel Sean Halloran reviewed the document and raised no objection to it being an  
25 excerpt of the EAB decision, instead signing off on its stipulated admission. Had Mr. Halloran  
26 objected to the admission of the excerpt, it would have been simple to substitute the whole  
27 document at that time.

1           9. The excerpt of the EAB decision is the only portion of the 55-page decision that is  
2 relevant to the issues at trial. It concerns the portion of the 2003 Permit Modification that was  
3 remanded by the EAB, leaving in place the TDS permit limitations of the 1998 permit.

4           10. I showed Teck Cominco's counsel exhibits 74 through 101 during the January 18,  
5 2008 exhibit review. Teck Cominco's counsel Sean Halloran reviewed the documents, all of  
6 which are letters from Teck Cominco to EPA describing apparent permit exceedances. Mr.  
7 Halloran raised objections to Exhibit 91 and 101, on grounds that Exhibits 91 and 101 were not  
8 complete. Adams thus marked those two exhibits "ID" rather than "ADM." Mr. Halloran had no  
9 objection to the admission of Exhibits 74 through 90 and 92 through 101.

10           11. I showed Teck Cominco's counsel exhibits 108 and 109, which are Teck Cominco's  
11 sworn responses to Interrogatories, during the January 18, 2008 exhibit review. Teck Cominco's  
12 counsel Sean Halloran reviewed the documents and approved them, as is, for admission. Had  
13 Mr. Halloran objected to the admission of Exhibits 108 and 109, it would have been simple to  
14 include the Attachments D and F which Teck Cominco now objects to not being included.  
15 Although Teck Cominco now says (in an unsworn assertion of counsel) that "Teck Cominco did  
16 not agree to an incomplete document being admitted," Objection at 4, that is precisely what Teck  
17 Cominco did.

18           12. I showed Teck Cominco's counsel Exhibit 150 during the January 18, 2008 exhibit  
19 review. Teck Cominco's counsel Sean Halloran reviewed the document and approved it for  
20 admission. Exhibit 150 is a copy of the Consent Decree in *United States of America v. Cominco*  
21 *Alaska Incorporated*, A97-267-CIV (JKS) (filed November 25, 1997); the original is a certified  
22 copy. Both Adams and Teck Cominco disclosed this document, and Teck Cominco itself  
23 produced a copy of this document during discovery. Attached as Exhibit 3 is a true and correct  
24 excerpt from Enoch Adams, Jr.'s Responses to Teck Cominco's Fifth Requests for Production,  
25 including RFP Nos. 118, 120, 121, 122, 123, 130, 131, 132, 133, 134 and 148, served on Teck  
26 Cominco on March 16, 2005. An almost identical RFP was included in the Discovery responses  
27 of Jerry Norton, David Swan, Andrew Koenig and Joseph Swan. The case was mentioned in  
28

1 more than 50 discovery responses.

2 13. I showed Teck Cominco's counsel Exhibits 115, 116, 117, 118, 119, 120, 121, 124,  
3 125, 127, 131, 138, 151, 152, 153, 154, 155, 159 and 168 during the January 18, 2008 exhibit  
4 review. The documents are internal Teck Cominco reports which Teck Cominco produced  
5 during discovery (115, 116, 117, 118, 119, 120, 121, 124, 125, 127, 131) and Teck Cominco's  
6 financial statements which it produced during discovery (151, 152, 153, 154, 155, 159). Teck  
7 Cominco's counsel Sean Halloran reviewed the documents and approved them for admission.

8 14. I showed Teck Cominco's counsel Exhibits 165, 166 and 167 during the January 18,  
9 2008 exhibit review. Teck Cominco's counsel Sean Halloran reviewed the documents and  
10 approved them for admission. Teck Cominco's counsel made no disclosure at the Rule 39.3  
11 exhibit review that Teck Cominco would be offering the same exhibit. Attached as Exhibit 2 is a  
12 true and correct copy of the Exhibit List that Teck Cominco provided me on January 18, 2008.  
13 The hand-written annotations are my notes from that meeting.

14 15. I showed Teck Cominco's counsel Exhibits 43-70 during the January 18, 2008  
15 exhibit review. Teck Cominco's counsel Sean Halloran reviewed the documents and approved  
16 them for admission. Adams and Teck Cominco agreed to have these exhibits fully admitted  
17 (along with the complete laboratory reports from which they came, submitted by Teck Cominco).  
18 Attached as Exhibit 4 is a true and correct copy of an email from Rachel Davis of Teck  
19 Cominco's law firm to me, memorializing this stipulation. Adams allowed in all of Teck  
20 Cominco's lab reports that it had previously been served – despite the fact that the vast majority  
21 were served on Adams well after the Court's August 31, 2007 deadline for such disclosures –  
22 with the agreement that Adams's excerpts of the lab reports would also be allowed in. Had Teck  
23 Cominco not made this agreement, Adams might well not have stipulated to the admission of all  
24 the late-disclosed lab reports. Adams has relied to its detriment on the representations of Teck  
25 Cominco's law firm.

26 17. Teck Cominco objects that Exhibit 92 is “missing [its] fax cover sheet[] and their  
27 spill reports” although Teck Cominco has previously authenticated it as a “true and correct copy”  
28

1 in Requests for Admission. A true and correct copy of Teck Cominco's responses to various  
2 relevant Requests for Admission in the KRPC case is attached as Exhibits 5, 6 and 7. Teck  
3 Cominco also objects to the inclusion of many of its original DMRs as "incomplete." These  
4 DMRs were admitted as "true and correct" copies in the KRPC litigation, and as "true and  
5 correct" copies of earlier-filed DMRs in this litigation.

6 18. In the KRPC case, Teck Cominco admitted that the DMRs were true and correct. In  
7 this case, as its litigation strategy emerged, Teck Cominco has admitted that most of these DMRs  
8 are a "true and correct copy of an earlier, and now superseded... DMR" in its Requests for  
9 Admission in this case. Teck Cominco also provided Adams with a preliminary exhibit list on  
10 January 18, 2008. This exhibit list included 139 exhibits. Exhibit 2 to Cole dec. Teck  
11 Cominco's counsel described it as a "work in progress."

12 19. The DVD at Exhibit 147 is a transfer from a videotape that was used by the U.S.  
13 Environmental Protection Agency to take enforcement action against Teck Cominco and which  
14 Teck Cominco has received in the past. Authentication and foundation will be provided at trial.

15 20. A true and correct copy of the first two pages of Exhibit 122 is attached as Exhibit 8.

16 21. A review of the document proffered as Exhibit 12 reveals that the document is in fact  
17 a September 1999 DMR submitted to EPA on October 12, 1999.

18 22. A review of Exhibit 38 indicates that it is in fact, a single May 2006 DMR and  
19 various attachments, submitted to EPA on June 15, 2006.

20 23. Exhibits 71 and 72 were obtained after Adams deposed Mark Thompson. During the  
21 deposition, Mr. Thompson stated that he had spreadsheets summarizing all of the discharge data  
22 for the Red Dog Mine; Adams' asked for and received a copy of those spreadsheets.

23 24. My recollection of the January 18, 2008 meeting with Mr. Halloran is that Teck  
24 Cominco agreed to admit Exhibit 135, although, unlike my notes on the other exhibits at issue  
25 here, my notes and memory are not clear on this particular exhibit.

26 25. The Teck Cominco Limited annual reports were disclosed to Teck Cominco as part  
27 of Adams's responses to discovery requests.



1 Nancy S. Wainwright  
Law Offices of Nancy S. Wainwright  
2 13030 Back Road, Suite 555  
Anchorage, Alaska 99515-3538

3 James E. Torgerson  
4 Heller Ehrman White & McAuliffe LLP  
510 L Street, Suite 500  
5 Anchorage, Alaska 99501-1959

6 David S. Case  
Landye Bennett Blumstein LLP  
7 701 W. 8<sup>th</sup> Ave., Suite 1200  
Anchorage, AK 99501

8 Thane Tienison  
9 Landye Bennet Blumstein  
1300 Southwest Fifth Ave, Suite 3500  
10 Portland, OR 97201

11 /s/ Luke Cole  
Luke Cole